Primestar Comments at 16. According to the scale contained in their comments, for example, a DBS system with 150-174 channels would be required to reserve just 6 channels. But for systems with 151 - 174 channels, 6 channels is less than 4% of the capacity. The same flaw appears in the proposed set aside for 100-124 channels (4 channels < 4% on systems with 101-124 channels), 125-149 channels (5 channels < 4% on systems with 126-149 channels) and 175+ channels (7 channels < 4% on systems with 176+ channels). *Id.* If the Commission does choose to limit the capacity set-aside, it must, at the very least, ensure that no less than 4% of capacity is reserved.[12]

As discussed at pp. 4-5, *supra*, DBS' relative youth is not relevant for determining the amount of capacity providers should set aside. What is relevant is the fact that DBS is viable and will continue to grow tremendously with the advent of new compression technologies. Thus, there is no good policy reason why the largest and most powerful DBS systems, including some with more than 150 channels, cannot reserve a mere 7% of their capacity to meet their statutory obligations under Section 25(b). Smaller DBS systems, under DAETC, *et al.*'s scale, would have less of an obligation. DAETC, *et al.* Comments at 13-14. The incremental cost of reserving 7 channels, as opposed to 4, for a 100 channel system is virtually zero, but the benefit to the public is tremendous.

Nor has the industry provided a good policy or legal reason why the set-aside should be

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[12]Sky Broadcasting asserts that it would be "unfair" for the Commission to rule that DBS providers offering duplicative programming to the eastern and western parts of the country through Half-CONUS service should be required to reserve 4-7% of the capacity of each Half-CONUS service. Sky Broadcasting Comments at 11. But it would be "unfair" to a DBS viewer on either coast if his system's Section 25(b) programming were to be cut in half simply because the other half of the country is receiving the same programming.

limited to video channels. Nothing in the plain language of Section 25(b) so limits the set-aside.[13] And the technology is no different - audio and data bits are the same as video bits in a digital world - the only difference is bandwidth. The 25(b) set aside requirement should apply separately to audio and data channels, which could be utilized by national educational programmers to provide noncommercial audio, data and internet services.[14] Barker channels, channels containing static video and channel guides need not be included in the set aside. *See, e.g.*, USSB Comments at 8; DIRECTV Comments at 6 n.11.[15]

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[13]TEMPO claims that because Section 25 (b)(1) applies the channel capacity requirement to a "direct broadcast satellite service providing video programming," the set-aside applies only to video channels. TEMPO Comments at 8. That language, however, merely describes the type of DBS provider that is subject to the set aside. The statutory language immediately following that phrase states "that the provider of such service reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature." This language does not include any mandate that the set-aside be applied only to video channel capacity.

[14]Sky Broadcasting argues that because the Commission has chosen not to apply public interest obligations to Digital Audio Radio Satellite systems, which provide digital audio programming, it should not apply the set aside to audio channels on DBS. Sky Comments at 12. This argument is flawed as a matter of law, and of policy. First, the Commission ***did*** apply public interest obligations to DARS, including requiring them to comply with Sections 312(a)(7) and 315, as well as the Commission's EEO rules. *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service*, FCC 97-70 (released March 3, 1997) at ¶¶91-92. Second, comparing DARS to DBS is like comparing apples and oranges: not one DARS system is now operative, nor is one expected to be operative before late 1999, at the earliest. Paul Farhi, "Music From the Spheres," Washington Post, May 19, 1997 at 5. DBS, on the other hand, is a proven technology with a substantial subscriber base and changes in technology that will permit it to expand its capacity dramatically. *See* discussion at pp. 2, 4-5, *supra.*

[15]Children's Television Workshop (CTW) proposes that the Commission permit a DBS provider to reduce its Section 25(b) obligations by providing increased children's educational programming under Section 25(a). CTW Comments at 6-7. But as DAETC, *et al.* discussed at length in their comments at p. 6, Sections 25(a) and 25(b) are distinct provisions that serve different purposes, and are therefore not interchangeable. While under Section 25(a), a DBS provider can offer high quality children's educational and civic programming, Section 25(b) is specifically intended to be a forum for programmers that are neither affiliated with, nor selected

VI. The Section 25(b) Capacity Should Be Measured By Discrete Channels.

The industry asks the Commission to permit DBS providers to fulfill their Section 25(b) obligations in one of two ways: 1) by allocating discrete channels or 2) by using a "time/hour equivalency basis" that would permit spreading the programming over a number of channels and time slots. SBCA Comments at 12; DIRECTV Comments at 7; Primestar Comments at 16.

DAETC, *et al.* strongly oppose the "time/hour equivalency" method of allocating Section 25(b) capacity, because it is simply another way for DBS providers to minimize their Section 25(b) obligations. In essence, this method would permit DBS providers to count an hour here and there of noncommercial educational and informational programming they may already offer on their systems, even if that channel also carries non-qualifying programming. *E.g.*, TEMPO Comments at 9; Primestar Comments at 16-17; DIRECTV Comments at 7. This cannot be reconciled with the plain language of Section 25(b). Congress expressly required each DBS provider to reserve "a portion of its ***channel*** capacity," not program time, for noncommercial educational and informational programming. 47 USC §335(b)(1). *Accord*, Encore Media Comments at 16. Moreover, permitting DBS providers to count programming on channels over which they have editorial control would contravene Section 25(b)'s express prohibition over exercising such control.[16]

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by the DBS provider. To the extent that a DBS provider wishes to reduce its capacity to the 4% minimum, DAETC, *et al.* have provided a mechanism by which it could do so by providing extra funding for 25(b) programming. DAETC, *et al.* Comments at 24-25.

[16]This prohibition over editorial control would also prohibit DBS providers from counting full channels of programming that they already carry on their systems toward their Section 25(b) obligations. *See* Encore Media Comments at 17 (If DBS provider already carries noncommercial educational channel, it should count toward 4-7% obligation). However, channels such as CSPAN, PBS or WAM! if they are already carried, could go towards satisfying a DBS provider's

Permitting DBS providers to spread programming over a number of channels and time slots would also be bad policy. As Encore Media points out, discrete channels dedicated to Section 25(b) programming would make this programming easy and dependable to locate, while permitting a patchwork of programming that could change from month to month would frustrate any effort to make this programming accessible. Encore Media Comments at 16. As the debate over TV ratings has borne out, parents especially want to be made aware of the availability of "kid friendly" programming. Jane Hall, "TV Ratings Don't Play Here, Peoria Says," Los Angeles *Times*, May 20, 1997. Moreover, as Encore asserts, such scattershot programming would make impossible any public or FCC oversight over DBS providers' Section 25(b) obligations. Encore Media Comments at 17.

To the extent that some programmers, like those that provide distance learning, have a need to access certain dayparts, DAETC, *et al.* have suggested the creation of one or two discrete channels for those programmers that cannot fill a full-time channel. DAETC, *et al.* Comments at 17. These programmers would have access to no more than 5% of the total program time on the Section 25(b) capacity, and would permit programming to be grouped by content or purpose. *Id.*

VII. Use of Section 25(b) Capacity is Limited to National Educational Programming Suppliers.

The Industry Commenters and Encore Media assert that Section 25(b) creates two classes of programmers that are eligible to use Section 25(b) capacity - "National Educational Programming Suppliers," which are entitled to access at special rates determined under Section 25(b)(4),

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obligations under Section 25(a). *See* discussion at pp. 5, *supra*.

and other programming suppliers, which are not entitled to such rates. *E.g.*, Sky Broadcasting Comments at 22; DIRECTV Comments at 16-17; Encore Media at 12. They contend that this "other" category may include for-profit and commercial programmers. *E.g.*, USSB Comments at 9; Encore Media at 12; Primestar Comments at 23.

This is an untenable reading of Section 25(b). Section 25(b)(3) plainly requires a DBS provider to make this capacity available to national educational programming suppliers, and, contrary to what TEMPO asserts, Section 25(b)(5) specifically defines what is included in that term. *See* TEMPO Comments at 11. If Congress had intended to broaden the eligible class of users, it would have use words like "including," or "not limited to." *Accord*, America's Public Television Stations Comments at 14. Nor is there any reference elsewhere in the statute or the legislative history to other programmers that would be permitted to use this capacity.

The theory that there are two classes of programmers entitled to different rate scales also fails under the plain language of Section 25(b)(4). That section states that "the Commission shall not permit such prices to exceed, for ***any*** channel made available under [subsection b], 50 percent of the total direct cots of making such channel available." 47 USC §335(b)(4)(B) [Emphasis added]. Thus, it is clear that there is no provision under Section 25(b) for "other" programmers to pay more than 50 percent of direct costs.

That Congress also chose to use the language "noncommercial programming of an educational or informational nature" in Section 25(b)(1) rather than the term "national educational programming supplier" does not demonstrate that it intended to broaden the field of eligible entities, as DIRECTV argues. DIRECTV Comments at 12. That language merely demonstrates Congress' intent that the programming provided by national educational programming suppliers

be noncommercial educational or informational programming.[17]

As discussed in DAETC, *et al.*'s Comments at 12-13, the term "national educational programming supplier" does include a broad segment of programming entities, each sharing one common denominator - they must be nonprofit and/or public.[18] Thus, SBCA, Sky Broadcasting and Primestar's assertion that these entities should include PBS, CSPAN and CSPAN2 is correct - they are all not-for-profit entities. SBCA Comments at 8, Sky Broadcasting Comments at 12; Primestar Comments at 24. On the other hand, the suggestion that for-profit programmers should be allowed to use Section 25(b) capacity is incompatible with the plain language of the statute.[19] Moreover, Primestar's request that DBS providers be permitted to place at least 50% of this programming on other than the basic tier, Primestar Comments at 17, runs contrary to Congress' intent that this capacity be broadly available to the public, not just those who can afford to pay extra.

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[17]As a general rule, not all "national educational programming suppliers" are prohibited from providing commercial programming. Indeed, CTW, which indisputably falls within the definition of national educational programming supplier, proposes doing just that. CTW Comments at 5.

[18]DAETC, *et al.* agree with CTW that non-profit organizations should be permitted to undertake partnerships with commercial entities for the purpose of producing Section 25(b) programming, but only to the extent that it has editorial control and greater than 60% ownership interest in the programming. *See* CTW Comments at 9. It should not, however, permit equal ownership and control of the programming, as CTW suggests. *Id.*

[19]Sky Broadcasting suggests that the term "national educational programming suppliers" should include political parties, candidates for federal office and other non-profit groups to the extent that they sponsor debates or discussions among federal candidates or representatives of national political parties or about topical issues of national importance. To the extent that these entities are either noncommercial educational television stations, public telecommunications entities or educational institutions, as defined in 47 USC §§397(6)(A&B), 397(12), and 397(7), they would qualify to use Section 25(b) capacity. *See* DAETC, *et al.* Comments at 12-13. Under those definitions, it appears that neither political parties or candidates for federal office would qualify.

VIII. DBS Providers Must Make Their Capacity Available 45 Days After The Commission Issues its Rules.

A number of DBS providers ask the Commission for a two year phase-in of their Section 25(b) obligations. *E.g.*, USSB Comments at 8, SBCA Comments at 13, DIRECTV Comments at 8. They claim to need this long period of time, *inter alia*, for negotiating or renegotiating programming contracts, notifying subscribers, and setting up the clearinghouse. *Id.*

In light of the four year delay in this proceeding and the industry's last minute attempt to have Section 25 declared unconstitutional, a request for an added two year delay is particularly unconscionable. As Sky Broadcasting so aptly notes in rejecting a long phase-in, "the American public has already had to wait several years for the public service programming mandated by Section 25," and "DBS providers have been on notice of the set-aside requirement since adoption of the 1992 Cable Act..." Sky at Broadcasting Comments 23.

It is for these very same reasons that DAETC, *et al.* urged that DBS providers make their capacity available under Section 25(b) within 45 days after the Commission releases its rules implementing this provision. DAETC, *et al.* Comments at 25-26. A DBS provider's need to negotiate and renegotiate programming contracts are irrelevant to the capacity reservation because they cannot have any editorial control over the Section 25(b) capacity. In any event, such contract negotiations can be accomplished in a matter of weeks, and FCC regulations require that a cable operator provide a subscriber with only 30 days notice of changes. 47 CFR §76.309. (c)(3)(i)(B). Moreover, to the extent that it will take some time (although nothing nearly approaching ***two years***) for a nonprofit "clearinghouse" to be formed and other changes made,

nothing should stop the DBS industry from starting that process *today.*[20]

IX. DBS Providers that Carry Over-the-Air Broadcast Signals Should Be Subject to the Same Laws that Govern Such Carriage on Cable, but Other than Providing For Non-Discriminatory Program Access, "Regulatory Parity" With Cable is Neither Mandatory nor Desirable.

The cable industry commenters argue that there should be "regulatory parity" between DBS providers and cable operators. *See generally*, Time Warner Comments, NCTA Comments, US West Comments. This argument has two parts. The first is that any DBS provider that carries local broadcast signals should be subject to the same obligations as cable attendant to such carriage, including must carry, syndicated exclusivity, and the network non-duplication rules. *E.g.*, Time Warner Comments at 23-38; NCTA Comments at 9-13; US West Comments at 9-11. The second is that all DBS providers should be subject various other structural regulations imposed on cable operators, including the program access requirements of 47 USC §548, the channel occupancy limits of 47 USC §533(f)(1)(B), the leased access provisions of 47 USC §532, the prohibitions against requiring a financial interest as a condition of carriage, 47 CFR §76.1300(c), and, if a DBS system provides regional programming, the requirement to carry channels and facilities for public, educational and governmental access. *E.g.*, Time Warner Comments at 38-48; NCTA Comments at 13-14; 16-22.

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[20]In practice, an item adopted at an FCC open meeting would not be effective for six to eight weeks because of delays in releasing text, publishing the rules in the Federal Register and the 30 day delay inherent in 5 USC §553(d). Adding 45 days to that time frame means that there would be three to four months for a transition.

A. DBS Providers that Carry Over-the Air Broadcast Stations Should Be Subject to Must-Carry, Syndicated Exclusivity, Network Non-Duplication and Sport Blackout Rules.

DAETC, *et al.* agree with the cable industry commenters that, to the extent DBS providers carry local over-the-air broadcast signals, they can and should be subject to the same carriage requirements that attend to cable operators' carriage of such stations. These requirements include must carry, syndicated exclusivity, network non-duplication and the sports blackout rules.

The reason for requiring these obligations of DBS providers are no different than for cable operators. Permitting DBS providers to carry only the largest and most profitable stations would be to the detriment of smaller stations, which are more likely to be minority owned or to provide programming that serves underserved communities. *See, e.g.*, H.R. Rep. 102-628, 102d Cong., 2d Sess. 52-53 (1992) (1992 House Report). To the extent that the syndicated exclusivity, network non-duplication and sports blackout rules also protect local stations from audience and advertiser erosion, they should also apply to DBS. *See U.S. v. Southwestern Cable*, 392 US 157, 177 (1968) (finding that Commission can regulate cable so that it may discharge its "broad responsibilities for the orderly development of an appropriate system of local television broadcasting").

However, DAETC, *et al.* do not agree with the cable industry commenters to the extent that they ask the Commission to prohibit common ownership of a DBS system and a local broadcast station. *E.g.*, Time Warner Comments at 29-32; NCTA Comments at 14-16. Cable operators are prohibited under FCC regulations from owning a local broadcast station. 47 CFR §76.501 (a). That ban is justified because local cable systems provide local programming and compete with local broadcast stations for local advertising. Thus, a local cable system could

compete unfairly by combining local advertising rates. No such concern is raised by common ownership of a DBS system and a local broadcast station -local advertisers would have little or no interest in obtaining time on a national multichannel technology such as DBS.

B. With the Exception of the Program Access Requirements, it is Neither Mandatory Nor Good Policy to Subject DBS Providers to Other Obligations Imposed on Cable Operators.

The cable industry commenters also ask the Commission to subject DBS providers to all other regulations applicable to cable regardless of whether they carry local broadcast signals. These include, but are not limited to, program access, PEG and leased access channels, channel occupancy limits, carriage regulations, taxes and franchise fees. Time Warner Comments at 38-48; NCTA Comments at 13-14; 16-22.

Characteristically, the cable industry goes too far, asking for rules which would hinder DBS. The Commission should not allow the cable industry to browbeat a potential competitor by applying regulations that were intended to curb cable's own monopolistic abuses. The majority of the regulations to which the cable industry refers were part of the 1992 Cable Act, and were direct responses to the vast record of specific anticompetitive abuses by the cable industry. *See, e.g.,* 1992 House Report at 41 (program access), 51-53 ("must carry"); S. Rep. 102-92, 102d Cong., 1st Sess. 24-26 (1991) (program access), 30, 33 (leased access), 42-45 ("must carry") (1991 Senate Report). They were also designed to ensure the existence and growth of competitors like DBS. *See, e.g.* 1992 House Report at 44, 46; 1991 Senate Report at 17, 26-28. Most importantly, Congress chose, in the 1992 Act, to regulate DBS through Section 25, and not through the other provisions the cable industry now wishes to apply to DBS. Indeed, as discussed at pp. 14-15, *supra*, Section 25(b) is modeled on cable regulation, specifically the

PEG/leased access scheme.

Although the DBS industry has grown rapidly and proven itself to be a viable multichannel video service, it has nowhere near the subscribership or the power that goes with level of vertical integration possessed by the cable industry. "Regulatory parity" would only serve to constrain DBS as a potential competitor to cable, while providing little or no public benefits.[21]

The cable regulation that the Commission should apply to DBS providers is the program access requirement of 47 USC §548, which prohibits discriminatory and unfair practices by vertically integrated cable operators in distributing programming. The program access law was intended to "promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market" by diminishing the ability of cable operators to refuse to provide popular programming to other multichannel video providers such as DBS. 47 USC §548(a). To the extent that certain DBS system providers also own programming on their systems, they have the same incentives to keep programming from their competitors, including other DBS systems. Thus, they should be similarly prohibited from engaging in discriminatory practices in the distribution of programming in which they have a financial interest.

CONCLUSION

It is 1997, and not 1993, and the DBS industry is now capable of providing a full panoply of public interest benefits. But while the industry has certainly changed, the plain language of

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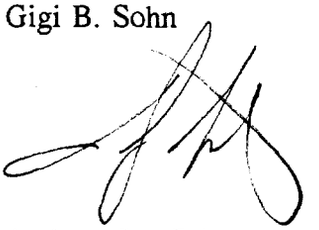
[21]The Commission has no authority to apply several of these obligations to DBS. Certainly, it has no authority to levy taxes or franchise fees. Moreover, it is dubious whether it has the power to mandate leased access in the absence of specific findings that it is necessary to ensure diversity or stop anticompetitive abuses. *See HBO v. FCC,* 567 F.2d 9, 34 (D.C. Cir.) *cert. denied* 434 U.S. 829 (1977).

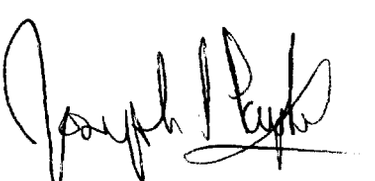
Section 25 has not. Regardless of whether the industry finds Section 25 outdated or burdensome is immaterial - it remains Congress' payment to the American people for the industry's use of the public airwaves. The Commission should delay no longer in making the disbursement.

Respectfully submitted,

Gigi B. Sohn



Andrew Jay Schwartzman



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